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THE BURDEN OF PROOF IN CASES OF INSANITY.

The subject of insanity is attracting so much attention recently, both in its medical and legal aspects; it is so frequently relied upon as a defence to criminal prosecutions, that the mode and manner of its proof in a court of justice, the evidence competent to be considered in ascertaining its existence, and the question by which party that evidence must be adduced, or the burden of proof in such cases, have all become interesting and important subjects of inquiry.

In this article we desire to call attention to the latter question merely. On whom rests the burden of proof where insanity is set up as a defence to an indictment for any crime? Is the burden upon the prosecution to establish the fact of sanity, or upon the accused to make out affirmatively the fact of insanity? Or, to state it more clearly perhaps, is the burden of proof ever on the defendant to *disprove his sanity*?

The answer to that inquiry may depend upon what is meant by the phrase "Burden of Proof." If the accurate meaning of that term is once established and kept steadily in view, it will tend far to guide us to a correct conclusion. Is, then, the burden of proof—the *onus probandi*—anything more or anything less than the duty of proving any fact substantially in issue? And is not that duty always upon the party who sub-

stantially asserts the affirmative of the issue? We say *substantially* asserts, not expressly merely, but also impliedly, really, truly. The obligation of proving a fact, which though not directly alleged on the record, is necessarily involved in the position, proposition or issue which either party to a legal trial assumes, lies upon such party in the same manner and to the same degree as if he had made the allegation in the most positive and direct terms.

With this understanding as to the meaning of the term, is there any doubt, can there be any doubt that as an original, fundamental proposition, the burden of proving sanity is on the government? As sanity—a mental competency to commit crime—is necessarily involved in the assertion that the accused has committed it, as much involved as the fact of giving the blow or using the deadly weapon, without which there is no crime, is not the obligation to establish the element of sanity on the same party who has the duty of proving the other facts alleged? To illustrate by the definition of murder: “Murder,” says Lord COKE, 3 Inst., 47, “is when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the King’s peace, with malice aforethought, express or implied.” Must not the fact of a *sound memory and discretion* be made out affirmatively and beyond a reasonable doubt, as well as the fact of killing or the fact of malice?

But it is said every man is presumed to be sane until the contrary is proved. That is true. But does such presumption change the burden of proof in the sense we have used it, and shift upon the defendant the burden of proving that he was not sane, so that if he fail to make out that fact affirmatively, he fails in his defence? The government asserts by the indictment of him that he was sane; he denies it, and says “I was not sane.” Here is an affirmative allegation on one side and a direct denial on the other. A defence of insanity is but a denial of sanity. Is the presumption of sanity anything more than a piece of evidence—one witness testifying affirmatively in support of that issue? and would the production of one witness to any fact which the prosecution was bound to

prove, shift upon the defendant the duty of disproving it? This presumption may make out a *prima facie* case—may, in the absence of any conflicting evidence, fulfil and discharge the original burden; may, standing alone, justify a jury in finding the party sane, but that is because the burden of proof is *satisfied*, not shifted upon the adverse party. This was the real point involved in *Commonwealth v. Eddy*, 7 Gray, 583. If the language used in that case seems to impose on the prisoner any greater duty than that of offering sufficient evidence of insanity to rebut and outweigh the presumption of sanity, and thus create a reasonable doubt of his sanity, it does not appear to us consistent with the doctrines of *Commonwealth v. McKie*, 1 Gray, 61.

Even in civil cases the existence of a presumption in favor of the plaintiff, or even the introduction of actual testimony establishing a *prima facie* case, does not shift the burden to the defendant of establishing a contrary proposition. The burden steadily remains throughout the entire case upon that party to whom it belongs in the outset. Producing much or little evidence in support of a given proposition or assertion cannot change the duty of proving it. Making out a *prima facie* case may call upon the defendant to offer some evidence to contradict the plaintiff's case; and the duty of producing countervailing evidence may thus devolve upon the defendant. *But the duty of denying an assertion is not the same as the duty of affirmatively proving its opposite.* Between these two termini there is a wide range of evidence which applies or may apply to a denial of the plaintiff's proposition, and look solely to that end, without seeking to establish an affirmative proposition in opposition thereto. However forcible or however convincing may be the plaintiff's testimony, however completely the original burden of proof resting on him may be carried and sustained, it is not thereby shifted upon him who denies the affirmative of the issue. That this is so in civil cases is abundantly clear: see *Powers v. Russell*, 13 Pick., 69, decided by the Supreme Court of Massachusetts in 1832, and certainly the great leading case on this subject. See also *Tourtellot v. Rosebrook*, 11 Met., 460; *Ross v. Gerrish*, 8 Allen, 147; *Cen-*

tral Bridge Corporation v. Butler, 2 Gray, 132; *Morrison v. Clark*, 7 Cush., 213; *Bradford v. Stevens*, 10 Gray, 379; *Delano v. Bartlett*, 6 Cush., 364; *Gay v. Bates*, 99 Mass., 263.

This rule prevails alike in actions sounding in tort and in suits or contracts. So when in a civil proceeding the question of sanity or insanity is directly an issue, although the presumption of sanity exists with at least as much force as in criminal prosecutions, still the burden of proving sanity always remains throughout the entire trial with that party who asserts it. An executor offering a will for probate impliedly asserts the sanity of his testator, his competency to execute a will. The presumption of sanity is with him, but the burden of affirmatively proving insanity is not thereby cast upon the opponents of the will. This is fully maintained in the excellent judgment of THOMAS J., in *Crowninshield v. Crowninshield*, 2 Gray, 524, which has been frequently approved and followed in other American cases: *Baxter v. Abbott*, 7 Gray, 83. See also *Rigg v. Wilton*, 13 Illinois, 15; *Morrison v. Smith*, 3 Bradford, 209; *Cramer v. Crambough*, 3 Maryland, 491; *Cilley v. Cilley*, 34 Maine, 162; *Baldwin v. Parker*, 99 Mass., 84; that the burden of proving sanity is on the executor. Such is also the English rule: *Barry v. Butlin*, 1 Curties, Ecc. R., 640; 2 Moore, P. C., 480; *Browning v. Budd*, 6 Id., 430; *Harwood v. Baker*, 3 Id., 282; *Sutton v. Sadler*, 3 C. B. (N. S.), 87, in which CRESSWELL, J., says "whether the party propounding a will relies upon a *prima facie* case, or gives the whole of his proofs in the first instance, *the onus remains on him throughout.*" In *Perkins v. Perkins*, 39 New Hampshire, 171, BELL, C. J., says, after reviewing the authorities, "It is, therefore, proper to say that the burden of proving the sanity of the testator and all the other requirements of the law to make a valid will, is upon the party who asserts its validity. This burden remains upon him till the close of the trial, though he need introduce no proof upon this point until something appears to the contrary."

If, therefore, in civil cases the burden of proving sanity is on the party who asserts it, *a fortiori*, it is so in criminal prosecutions. There the plea of "not guilty" denies and puts

to issue every material allegation and fact on which the prosecution rests; every *fact* as much as every express allegation. The mental competency *to be guilty* is necessarily involved in the denial of guilt. Insanity is not a fact in avoidance of guilt, but sanity is a condition precedent to guilt itself. It underlies and forms a part of the very charge, is one of the most essential ingredients in it. Were it an independent, substantive fact not necessarily embraced and included in the accusation, the burden of proof would very properly rest on the accused, and in analogy with the rule for which we are contending, would not shift upon the prosecution, even after he had offered *prima facie* evidence of such fact. Thus, suppose the defence to be a prior acquittal of the same offence; there the burden of proving that the former charge was for the same identical crime is on the prisoner, and does not change upon the introduction of sufficient *prima facie* evidence of such identity; it remains with him still. This is illustrated, if any authority is needed, by *Commonwealth v. Daley*, 4 Gray, 209, in which Judge BIGELOW applies the same rule to the prisoner as had been imposed on the government in *Commonwealth v. McKie*, 1 Gray, 61. But the fact of sanity is no such separate, independent, disconnected fact or proposition, but is as much a necessary part of the first step in the guilt of the accused as his own bodily presence at the time and place where the offence was committed. But suppose the defence was an *alibi*; is the burden on the defendant to make that out affirmatively to the satisfaction of the jury? Would the offence be proved upon him if the jury, upon all the evidence offered on both sides (or even if he offer none), have reasonable doubts of the *alibi*? or, in other words, reasonable doubt of his presence? We speak, of course, of those offences where bodily presence is necessary. That the burden of proof is not changed where an *alibi* is set up, but that the prisoner is entitled to an acquittal, if there be a reasonable doubt whether he was at the place and at the time when and where the offence was committed: see *Hopps v. The People*, 31 Illinois, 393; *Miller v. The People*, 39 Id., 465; *Fife v. The Commonwealth*, 29 Penn. St. R., 439; *State v. Cameron*, 40 Verm.,

556. But is not mental presence, a sound, healthy mental presence, as necessary to be proved beyond a doubt by the government as mere presence of body? And if a reasonable doubt of the latter entitles the accused to an acquittal, shall such doubt of the former have less effect?

Again. Suppose the defence to a charge for assault and battery or a homicide, be that the blow was accidental, or given in self-defence, is the burden of proving that fact affirmatively on the prisoner? Can the jury find him *guilty* if they have reasonable doubts upon that question? The convincing reasoning of Mr. Justice BIGELOW in *Commonwealth v. McKie*, 1 Gray, 61, furnishes a sufficient answer to that question. See also *United States v. McClare*, 7 Boston Law Reporter (N. S.), 439, December, 1854; *United States v. Lunt*, 1 Sprague's Dec. 311. But is not the general competency of the accused to be guilty as much involved in the charge itself as the particular mental intention or design at the exact moment the blow was inflicted? Is it not as much a necessary ingredient of the very offence, and should not the same rules apply? We are not arguing as to the weight to be given to the presumption of sanity, nor that the prosecution are bound to offer any other evidence of sanity in the first instance. It is clear they are not—*Commonwealth v. Eddy*, 7 Gray, 583—but the question is, Does the existence of such presumption cast the burden of disproving sanity on the prisoner? Is it so in other cases? Does a presumption of guilt arising from certain facts cast on him the burden of proving his innocence? The possession of stolen property recently after theft raises the presumption that the possessor committed the larceny; a presumption which, in the absence of any explanatory testimony, is *prima facie* proof of his guilt, proof sufficient to warrant a jury in finding that fact; but does it shift the burden of proof on him to establish affirmatively that he was not guilty? If, notwithstanding the presumption, the *prima facie* evidence arising from the possession, the jury are in reasonable doubt as to his guilt, should they convict him? A different rule was laid down by the Supreme Court of Maine, in *The State v. Merrick*, 19 Maine, R., 398, decided in 1841. The court below instructed the jury

that the fact of possession raised a legal presumption that the defendant stole the goods, and "that after such legal presumption of guilt had been raised, the burden of proof was upon the defendant to repel that presumption," and he was convicted. But the full court reversed this decision, and set aside the verdict, declaring that although "possession by the accused soon after the goods were stolen raised a reasonable presumption of his guilt sufficient to make out a *prima facie* case on the part of the government, proper to be left to the jury, yet if by the opposing testimony a reasonable doubt was thrown upon a *prima facie* case of guilt, it can no longer be said that the accused is proved guilty beyond a reasonable doubt." So in *The State v. Flye*, 26 Maine, 312, it was expressly held that although a *prima facie* case is made out against the accused, the burden of proof is not thereby changed, but still remains on the prosecution throughout the whole case. See also *Tarbox v. Eastern Steamboat Co.*, 50 Maine, 345; *Ogletree v. The State*, 28 Alabama, 702; *Commonwealth v. Kimball*, 24 Pick., 366, had laid down the same rule in Massachusetts as early as 1837. A *prima facie* case or *prima facie* evidence may *lift* the burden of proof; it does not shift it.

But how stand the authorities upon this exact question of sanity or insanity? Many judges are reported as saying that because a person is presumed sane, therefore the burden of proof is shifted upon him to prove his insanity, and even to make it out *beyond all reasonable doubt*. Thus in *The State v. Spencer*, 1 Zabriskie (N. J.), Chief Justice HORNBLOWER said: "The proof of insanity ought to be *as clear and satisfactory* in order to acquit on the ground of insanity as the proof of committing the act ought to be, in order to find a sane man guilty." In *The State v. Brinyea*, 5 Alabama, 241, it was held that the "prisoner was bound to make out by the testimony *beyond all reasonable doubt*, that he was insane at the time the act was committed, by proof strong, clear and convincing." Similar phrases may be found in *The People v. Myers*, 20 California, 518; *State v. Huting*, 21 Missouri, 477; *Loeffner v. The State*, 10 Ohio St. R., 598; *Fisher v. The People*, 23 Illinois, 283; *Graham v. The Commonwealth*, 16 B. Monroe,

589; *Bonfanti v. The State*, 2 Minnesota, 123; *State v. Starling*, 6 Jones (N. C.), 366; *The People v. McCann*, 3 Parker, C. C., 272; *State v. Stark*, 1 Strobhart, 479; *Regina v. Stokes*, 3 C. and K., 188; *Regina v. Higginson*, 1 C. and K., 130; *Regina v. Layton*, 4 Cox, C. C., 149; *Regina v. Taylor*, Id. 155; *Regina v. Turton*, 6 Id., 385; *State v. McCoy*, 34 Missouri, 531; *State v. Klinger*, 43 Id., 127, as late as 1868, steadily adhering to the doctrine.

Doubtless, in one sense of the word, some burden is on the defendant, that is, the burden of offering the first testimony on the question of sanity or insanity; for the general presumption of sanity is sufficient for the government to rest upon in the outset. They are not bound to produce any other evidence, and if there was nothing to shake this presumption, the jury might presume the fact; and as the defendant is bound to offer the first evidence, the burden of proof, in a rather loose sense of that term, might be said to be on him. And had this been all the error committed, it would not have been so important. But the danger of using such an erroneous form of expression is well illustrated by many of the foregoing cases, which have thereby been led into the deeper error of compelling the accused to prove his insanity affirmatively and beyond all reasonable doubt. Perhaps many of these cases mean to hold merely that the presumption of sanity is sufficient until some counter evidence is offered and sustains and satisfies the burden of proof, and do not intend to lay down the rule that the burden of proving insanity, in the sense we have used the term in this article, is shifted to the defendant; if so, they are consistent and reasonable. But if they go farther, and positively declare, as the language in some of them implies, that the burden of proof is so far on the defendant that although he raises by his evidence a reasonable doubt of his sanity, but does not quite clearly prove it beyond a reasonable doubt, he is not entitled to an acquittal, it is respectfully submitted they are unjust, unreasonable and not supported by the analogies of the law.

The first advance from this extreme doctrine seems to have been made in *Commonwealth v. Rogers*, 7 Met., 500, by the Supreme Court of Massachusetts, in which the jury, after

being in consultation several hours, came into court with this delicate, but all-important question: "Must the jury be satisfied beyond a doubt of the insanity of the prisoner to entitle him to an acquittal? Chief Justice SHAW, apparently recoiling from the extreme and harsh rule laid down in some cases before cited, replied that "*if the preponderance of the evidence* was in favor of the insanity of the prisoner, the jury would be authorized to find him insane." And he was found "not guilty, by reason of insanity." This was in 1844. In 1856 the leading criminal cases were published, in which Mr. Bennett, in a note to *Rogers'* case and *McKie's* case, argued that the rule was still more favorable to the accused in such cases, and if the jury had a reasonable doubt of his sanity, they were bound to acquit. This reasoning was cited and relied upon in a very able case in New Hampshire, in 1861, *State v. Bartlett*, 43 N. H. R., where an interesting opinion was given by BELLOWS, J.

This subject was carefully considered by the New York Court of Appeals in *The People v. McCann*, 16 New York, 58, for the murder of his wife. The judge below, before whom he was tried (see 3 Parker, C. C., 272), had instructed the jury as follows: "The fact of killing is admitted; that the act was done by the prisoner is not disputed; thus the issue is really reversed from the usual one. The question of insanity is matter of positive defence, and it is a defence to be affirmatively proved; a failure to prove it is like the failure to prove any other fact, the misfortune of the party attempting to make the proof. The act being plainly committed, and that the prisoner did it being undoubted, and the defence set up on his part that he was insane, the burden of proof is shifted; as sanity is the natural state, there is no presumption of insanity, and the defence must be proved beyond a reasonable doubt." But this charge was held erroneous, and a new trial ordered, and BROWN, J., very clearly and forcibly states the true rule of law in such cases. In the trial of Gen. Sickles, in the District Court at Washington, for the murder of Philip Barton Key, Judge CRAWFORD ruled, after elaborate arguments, that the burden of proving sanity was throughout on the government, and

if the jury had a reasonable doubt of that fact, they must acquit, and the result is well known: see pamphlet report of Sickles' trial, p. 106. Such is now the general inclination of the American authorities: see *Polk v. The State*, 19 Indiana, 170; *Chase v. The People*, 40 Illinois, 352; *The People v. Garbutt*, 17 Michigan, 9, where an able opinion by COOLEY, C. J., may be found; *Hopps v. The People*, 29 Illinois, 386, qualifying the earlier decision of *Fisher v. The People*, 23 Illinois, 293. Massachusetts has made one more advance in the right direction, in the case of *Commonwealth v. Heath*, 11 Gray, 303, 1858, holding that when the defence is idiocy, an *original defect and want of capacity*, the burden of proving competency is throughout on the government, notwithstanding the presumption; but leaving it still an open question whether the same rule applies to derangement, alienation or disease of mental faculties; but it seems that the logical application of the doctrines of *McKie's* case, so generally approved in that state, leaves no escape from the full adoption of the position herein advocated, when a proper case shall arise for adjudication: see Andrews' trial, p. 258.

In conclusion therefore, may we not assume that reason, analogy and the better considered modern authorities all concur in declaring that the burden of proof in criminal cases never shifts upon the defendant to establish affirmatively the fact of his insanity, but that if upon the whole evidence, on both sides, the jury have reasonable doubts of his sanity, they cannot convict, and therefore must acquit? E. H. B.

RECENT AMERICAN DECISIONS.

Court of Appeals of Kentucky.

GARTIN AND OTHERS v. PENICK AND OTHERS.

1. In 1857, Penick conveyed to Chandler and others, in trust for the use of the "Bethel Union Church," several acres of land in Marion County, on which that church, then affiliated with the New School organization of Presbyterianism, erected a new house of worship.

Nearly a year after this conveyance of 1857, the members of the "Bethel Union" unanimously joined the "Old School" organization.